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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIRO AGUSTIN, Defendant and Appellant.	B289591 (Los Angeles County Super. Ct. No. BA437236)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Affirmed in part, remanded in part.

Edward H. Schulman for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

Jairo Agustin (defendant) and two other gang members accosted a rival gang member, struck him in the face with a hard object and put a bullet in his skull. A jury convicted defendant of second degree murder and criminal street gang conspiracy to commit murder, and the trial court sentenced him to prison for 60 years to life. On appeal, defendant challenges his second degree murder conviction, the imposition of the 25-year firearm enhancement, and two aspects of his sentence. Only one of his arguments has merit. Accordingly, we affirm his convictions but remand for the trial court to assess whether to exercise its newfound discretion to strike the five-year enhancement it previously imposed for defendant's prior commission of a serious felony.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Defendant is a self-admitted member of the 18th Street gang who goes by the name "Slick." In May 2015, the 18th Street gang was in the midst of a turf war with one of its rivals, the MS-13 gang. Both gangs laid claim to a strip mall on the corner of 7th and Shatto Place in Los Angeles, and had spent the preceding weeks crossing out and painting over one another's graffiti on one of the strip mall's buildings.

On May 22, 2015, defendant drove to the strip mall, approached an MS-13 gang member and two others standing near the graffitied wall, and told them to "[g]et away from that shit." Defendant drove off, but returned a few minutes later followed by a second car carrying two other men. All three got out of their cars. Defendant approached the MS-13 gang member and struck him in the face with a hard object. One of the other two men then shot the MS-13 gang member in the head. The

three men got back into their cars and drove away. The assault and shooting were captured by one of the strip mall's video cameras; an eyewitness identified defendant as one of the assailants; and the partial license plate of the car defendant drove came back to a vehicle registered to defendant's gang-member girlfriend and often driven by defendant.

The MS-13 gang member died from the gunshot wound.

II. Procedural Background

The People charged defendant with (1) murder (Pen. Code, § 187, subd. (a)),[1] and (2) criminal street gang conspiracy to commit "felonious criminal conduct" (§ 182.5). The People alleged that the murder was "committed for the benefit of, at the direction of, or in association with a criminal street gang" (§ 186.22, subd. (b)(1)(C)), and that, in committing the murder, a principal personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)). The People further alleged that defendant's 2009 conviction for a drive-by shooting (§ 12034, subd. (c))[2] constituted a prior "strike" within the meaning of our Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)) as well as a prior "serious" felony (§ 667, subd. (a)(1)).

The trial court gave comprehensive instructions to the jury. With regard to the murder charge, the court instructed on the crimes of first and second degree murder and on two theories

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The information erroneously alleged that the prior offense violated subdivision (a) (rather than (c)) of section 12034, but the People amended the information at sentencing to correct this typographical error (because subdivision (a) is a misdemeanor).

through which defendant could be held liable for the shooting committed by another—namely, that defendant (1) aided and abetted the murder itself or (2) aided and abetted an assault with a deadly weapon, the natural and probable consequence of which was murder. With regard to the criminal street gang conspiracy, the court instructed the jury that the object of that conspiracy was "murder."

The jury returned verdicts finding defendant guilty of second degree murder and criminal street gang conspiracy, and finding the gang and firearm allegations to be true. Defendant subsequently admitted his prior drive-by shooting conviction.

The trial court sentenced defendant to prison for 60 years to life. The court imposed a sentence of 60 years to life for the second degree murder, comprised of a base sentence of 30 years to life (15 years to life, doubled due to the prior strike) plus 25 years for the firearm enhancement plus five years for the prior "serious" felony enhancement. The court imposed a 15-year sentence for the criminal street gang conspiracy, but stayed it pursuant to section 654. The court rejected defendant's motion to dismiss the prior "strike" allegation and the firearm allegation.

Defendant filed this timely appeal.

DISCUSSION

I. Validity of Convictions and Enhancements

A. *Second degree murder conviction*

Defendant argues that he is entitled to have his second degree murder conviction vacated because (1) that conviction potentially rests on the theory the murder was the natural and probable consequence of an assault with a deadly weapon he aided and abetted, and (2) Senate Bill 1437 retroactively amended the definition of "murder" to preclude a jury from

"imput[ing]" "[m]alice" "based solely on his . . . participation in a crime" (§ 188, subd. (a)(3)).

We reject this argument because Senate Bill 1437 creates a special mechanism for defendants "convicted of . . . murder under a natural and probable consequences theory" to "file a petition" to vacate their murder convictions based on this change in the law. (§ 1170.95, subd. (a)(3).) Where, as here, our Legislature has created a special statutory remedy for defendants to use in availing themselves of a retroactive change in the law, that procedure must be followed, and relief will not be granted on direct appeal of a conviction that is valid under the prior law. (*People v. Dehoyos* (2018) 4 Cal.5th 594, 603 (*Dehoyos*) [so holding, as to Proposition 47]; *People v. Conley* (2016) 63 Cal.4th 646, 652 (*Conley*) [so holding, as to Proposition 36].) One appellate court has applied this rule to Senate Bill 1437's special statutory remedy. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727-729.)

Defendant resists this conclusion with two arguments.

First, he argues that Senate Bill 1437's remedy—unlike the special statutory remedies at issue in *Dehoyos* and *Conley*—is not meant to be exclusive because (1) Senate Bill 1437's remedy says that defendants "may" file a petition under the statutory remedy (§ 1170.95, subd. (a)) (rather than that they "must" do so), and (2) Senate Bill 1437's remedy also provides that it "does not diminish or abrogate any rights or remedies otherwise available to the petitioner[-defendant]" (*id.*, subd. (f)). Neither of these grounds distinguishes *Dehoyos* or *Conley*. The statutory remedies at issue in both of those cases also provide that the defendant "may" file a petition. (§§ 1170.126, subd. (b), 1170.18, subd. (a).) The word "may" leaves it to the defendant whether to file a petition at all; it

does not render the statutory procedure non-exclusive. The statutory remedies at issue in *Dehoyos* and *Conley* also provide that they do "not diminish or abrogate any rights or remedies otherwise available to the petitioner." (§§ 1170.126, subd. (k), 1170.18, subd. (m).) More to the point, both *Dehoyos* and *Conley* specifically rejected the argument that this language renders the statutory remedy non-exclusive. (*Dehoyos*, *supra*, 4 Cal.5th at pp. 605-606; *Conley*, *supra*, 63 Cal.4th at pp. 661-662.)

Second, defendant asserts that Senate Bill 1437's remedy, unlike the special statutory remedies at issue in *Dehoyos* and *Conley*, does not disentitle a defendant to retroactive relief upon a finding by the trial court that the defendant poses an "unreasonable risk of danger to public safety." (§§ 1170.18, subd. (b); 1170.126, subd. (f).) This is true, but irrelevant. Senate Bill 1437's special statutory remedy disentitles a defendant to retroactive relief upon a finding by the trial court that he personally "act[ed] with malice aforethought." (§ 188, subd. (a)(3).) Thus, under all three statutes, there is the need for the development of further facts. This is a task to which trial courts are suited and appellate courts are not. This is undoubtedly why the special statutory remedy in each of these statutes requires petitions to be filed in the trial court, and why making those remedies exclusive puts the petitions in the court whose institutional competence is best suited to evaluate such requests for retroactive relief.

We accordingly decline to revisit defendant's second degree murder conviction in this appeal, but do so without prejudice to his right to seek relief under Senate Bill 1437's special statutory remedy.

B. *Firearm enhancement*

Defendant argues for the first time on appeal that he cannot stand convicted of *both* a murder involving a firearm *and* the firearm enhancement. This dual "conviction," he asserts, runs afoul of (1) California's prohibition against being convicted of a crime and a necessarily included offense (e.g., *People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*)), and (2) double jeopardy (U.S. Const., art. V; Cal. Const., art. I, § 15). We review these arguments de novo (*People v. Licas* (2007) 41 Cal.4th 362, 366 [definition of lesser included offense]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154 [constitutional arguments]), and conclude that they lack merit.

Although a criminal defendant may generally stand convicted of "two or more different offenses connected together in their commission" (§ 954), such "multiple convictions may *not* be based on necessarily included offenses" (*Ortega*, *supra*, 19 Cal.4th at p. 692). However, this bar on multiple convictions for a crime and its necessarily included offense is inapplicable here for two reasons. First, our Supreme Court has squarely held that "a[] [sentencing] enhancement cannot be equated with an offense" for purposes of section 954 and its exceptions, such that the multiple-conviction bar simply does not apply here. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 134 (*Izaguirre*); *People v. Anderson* (2009) 47 Cal.4th 92, 115.) Second, even if we considered the firearm enhancement to be an offense, that enhancement is not a necessarily included offense to murder. In assessing whether one offense is a lesser included (and hence a necessarily included) offense, we examine whether the "statutory elements of the greater offense include all of the statutory elements of the lesser offense." (*People v. Reed* (2006) 38 Cal.4th

1224, 1227.) Here, they do not because a murder may be convicted without the use of a firearm. (§ 187, subd. (a) [defining murder as "the unlawful killing of a human being . . . with malice aforethought"].)

Double jeopardy "'protects against'" (1) "'a second prosecution for the same offense after acquittal,'" (2) "'a second prosecution for the same offense after conviction,'" and (3) "'multiple punishments for the same offense.'" (*Brown v. Ohio* (1977) 432 U.S. 161, 165.) Allowing defendant to stand convicted of murder and the firearm enhancement does not run afoul of these protections. The first two prohibitions involve *successive* prosecutions and do not apply, as here, where there is only a single, unitary prosecution. (*Izaguirre*, *supra*, 42 Cal.4th at p. 134.) And the last prohibition does not apply because the double jeopardy-based bar on multiple punishments may be overridden if the legislature "specifically authorize[s]" cumulative punishment (*People v. Sloan* (2007) 42 Cal.4th 110, 121, citing *Missouri v. Hunter* (1983) 459 U.S. 359, 368-369), and the firearm enhancement in section 12022.53 is just such a legislative override.

Defendant urges that all of the above cited precedent dooming his arguments must be brushed aside in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) because, in his view, *Apprendi* held it is impermissible to draw any distinctions between an offense and a sentencing enhancement. We reject this argument for two reasons. First and foremost, our Supreme Court has already rejected this argument (*Izaguirre*, *supra*, 42 Cal.4th at pp. 128-133; *Sloan*, *supra*, 42 Cal.4th at pp. 122-123), and we are not at liberty to disagree with our Supreme Court (*Auto Equity Sales, Inc. v.*

Superior Court (1962) 57 Cal.2d 450, 455-456). Second, we independently agree with our Supreme Court's rejection of defendant's argument. *Apprendi* specifies that any fact that increases the sentencing range applicable to a criminal defendant must be found by a jury beyond a reasonable doubt—regardless of whether that fact is designated as an "element" or a "sentencing enhancement." (*Apprendi,* at p. 490.) That mandate was met here with regard to the firearm enhancement. *Apprendi* does not by its holding or rationale purport to obliterate *all* distinction between criminal offenses and sentencing enhancements, particularly where, as here, the distinction concerns the legislative power to define substantive crimes and their punishments.

II. Sentencing

A. *Criminal street gang conspiracy*

Defendant contends that the trial court erred in imposing the stayed sentence of 15 years to life on the criminal street gang conspiracy charge. In imposing that sentence, the court looked to the sentence for second degree murder. (Accord, § 182 [conspiracy "to commit . . . a felony" is punished "in the same manner and to the same extent as is provided for the punishment of that felony"].) Defendant asserts that this was error because the object of the criminal street gang conspiracy was not murder, but was instead either (a) assault with a deadly weapon, or (b) promotion of a criminal street gang (§ 186.22, subd. (a)), each of which have a lower sentence than second degree murder. We independently review defendant's argument because it rests on statutory interpretation and instructional issues. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234 [statutes]; *People v. Cole* (2004) 33 Cal.4th 1158, 1210 [jury instructions].)

The trial court properly imposed a sentence of 15 years to life for the criminal street gang conspiracy charge. The appropriate sentence for conspiracy is tied to the sentence for the object crime (§ 182), and the trial court instructed the jury that the object crime for the charged criminal street gang conspiracy was "murder." Defendant asserts that neither the *information* nor the *verdict form* spelled out the object offense as "murder," but these omissions—even if not forfeited due to the lack of any objection (e.g., *People v. Goldman* (2014) 225 Cal.App.4th 950, 956 [failure to demur to information forfeits argument on appeal])—were not prejudicial in light of the unequivocally clear jury instructions spelling out the object crime. (E.g., *People v. Hardeman* (1966) 244 Cal.App.2d 1, 12-13 [defect in charging document may be harmless error].) Defendant nevertheless argues that the object offense should be either assault with a deadly weapon (because assault was the "target offense" in the natural and probable consequences instruction) or promotion of a criminal street gang (because the language of subdivision (a) of section 186.22 "parallels" the language of section 182.5), but these arguments ignore the plain language of the jury instructions that specifically designates the object offense of the criminal street gang conspiracy. We presume that jurors follow the instructions that they are given (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152), and those instructions definitively foreclose the arguments defendant now makes on appeal. Defendant also cites the rule of lenity, but it is inapplicable where, as here, the jury instructions are crystal clear.

B. *Senate Bill 1393*

On September 30, 2018, the Governor signed Senate Bill 1393, which amends section 1385 to eliminate the prohibition on

dismissing prior "serious" felony conviction allegations under section 667, subd. (a). (§ 1385, subd. (b) (2018 ed.); Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 2.) Because this new law grants a trial court the discretion to mitigate or reduce a criminal sentence, it applies retroactively to all nonfinal convictions unless our Legislature has expressed a contrary intent. (*People v. Francis* (1969) 71 Cal.2d 66, 75-78; *In re Estrada* (1965) 63 Cal.2d 740, 744-745.) Our Legislature has expressed no such intent in Senate Bill 1393. Because defendant's conviction is not final, he is entitled to have the trial court exercise its newfound discretion whether to strike the prior serious felony allegation unless the court, during the original sentencing, "clearly indicated . . . that it would not . . . have stricken" those allegations if it had been aware of having the discretion to do so. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [""remand would be an idle act and is not required"" in such cases].)

A remand is necessary in this case because the trial court did not "clearly indicate[]" that it would reject a request to strike the five-year prior "serious" felony enhancement. To be sure, and as the People point out, the trial court rejected defendant's motions to reduce his sentence by 25 years (by striking the firearm enhancement) and by 15 years (by striking the prior "strike" allegation). And the court did so because it viewed defendant's unprovoked act of murdering an unarmed man over a turf dispute to be "pretty egregious." But the court did not indicate what it would do if it had the discretion to reduce defendant's sentence by a smaller, five-year increment and, we note, elsewhere commented that it took "no pleasure . . . at sentencing somebody to the amount of time that [defendant] is looking at receiving." On this record, we cannot say that the

court "clearly indicated" it would reject any request to knock five years off of defendant's sentence.

Accordingly, a remand to allow the trial court to exercise its newfound discretion is warranted.

DISPOSITION

The case is remanded to allow the trial court to consider whether the enhancements under section 667, subdivision (a)(1), should be stricken pursuant to Senate Bill 1393. If the trial court elects to do so and resentences defendant, the trial court is directed to prepare an amended abstract judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST